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[ORIGINAL CIVIL JURISDICTION]
HOWES, J.
June 1, 1937.

SAVANNA RASOO
v.
TAN SONG HONG (M.W.)

[SINGAPORE ORIGINATING SUMMONS
No. 75 of 1937]

Conveyancing and Law of Property Ordinance (Cap. 118), s. 4—Contract—Sale of land—Conditions of sale—Defect prior to root of title —Notice aliunde.

By special conditions of sale vendor stipulated as the root of title a conveyance dated 8th February 1935. In connection with the conveyance the vendor's solicitor sent to the purchaser's solicitor not merely the deeds subsequent to the root of title but the deeds prior thereto. Thereby the purchaser received notice of a defect of title prior to 1935 namely that on the 28th February 1934 the administrator of a previous owner had mortgaged the property for his private debt in breach of trust; such mortgage being a link in the chain of title.

Held, that the purchaser was not precluded by the special conditions from raising this objection to the title, that the objection was a good one and that the title was obviously defective and could not be forced upon the purchaser and that the purchaser ought to be discharged from his purchase.

ORIGINATING SUMMONS.

Parsons for plaintiff.

Fung for defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

HOWES, AG. C.J.—In this summons, taken out under s. 4 of the Conveyancing and Law of Property Ordinance (Cap. 118), the plaintiff, the purchaser of the land, asks for a declaration that (i) he is not precluded by clause 4 of the special conditions of sale from raising his objection that a mortgage dated 28th February 1934 is defective; (ii) that a good title to the land had not been shown; (iii) that the defendant (the vendor) be ordered to repay the sum of $300 paid as deposit; and, (iv) that the defendant be ordered to pay the plaintiff's costs of investigating the title and of this application.

Clause 4 of the above conditions read:

> "The title shall commence with an Indenture of Conveyance dated the 8th day of February 1935 (Registered in Volume 867 No. 110) and made between Seena Oona Soona Pana Pillappa Pillai of the one part and Lim Siew Hock of the other part.
>
> The Purchaser of the property shall not require the production of or investigate or make any requisition or objection in respect of any deeds or documents not in the vendor's possession."

The law applicable to summonses of this nature was considered at length in the case of *In re National Provincial Bank of England and Marsh*, (1896) 1 Ch. 190.

The cases on the question whether and how far the inquiry into title has been limited by the conditions of sale, fall into two categories:—

(a) Where the conditions preclude the purchaser from making requisitions upon or inquiries from the vendor as to his title,—which relieves the vendor from complying with or answering any such requisition or inquiry, but does not prevent the purchaser from showing, by any means in his own power, that the vendor's title was defective; and

(b) Cases in which the conditions preclude the purchaser not only from making such requisitions upon and inquiries from the vendor, but from making any inquiry or investigation about the title anywhere; which may quite validly be stipulated, and will generally, provided that the stipulation be clear, altogether preclude inquiry and investigation for every purpose.

In some cases, there may be a condition that the title shall commence with a deed of a certain date and that no earlier or other title shall be required or inquired into by the purchaser: in others, that a lessor's title should either be produced or inquired into.

In the present case, the title is to commence with a conveyance dated the 8th February 1935 made between S.O.S.P. Pillappa Pillai and Lim Siew Hock; and the purchaser shall not require the production of or investigation or make any requisition or objection in respect of any deeds not in the vendor's possession."

These conditions, therefore, only precluded the purchaser from investigating or objecting to deeds not in the possession of the vendor; and did not prevent the purchaser from showing that the title was defective.

Mr. Parsons, solicitor for the purchaser, on the 12th April 1937 applied for the loan of the title deeds; and as the result, Mr. Fung sent not only the conveyance of 2nd February 1935 but the other title deeds going back to 4th July 1919, which led to the discovery of a mortgage dated 28th February 1934 given by one Savena Chidambaram Chettiar, as administrator of the estate of V. R. S. Saminathan Chettiar, to S. O. S. P. Pillappa Pillai (the vendor in the above conveyance of 8th February 1935) as security for his

personal account with S.O.S.P. Pillappa Pillai. The latter, in exercise of his power of sale as mortgagee, conveyed the land to Lim Siew Hock, through whom the subsequent title is derived.

Mr. Parsons contends that this mortgage of the land by the administrator as security for his personal account, discloses a breach of trust; and consequently, the mortgage and subsequent dealings with the property are defective.

On the strength of this alleged defect, Mr. Parsons, on behalf of the purchaser, demanded the return of the deposit ($300) and $27 costs for investigating the title. On Mr. Fung's refusal to refund the deposit, Mr. Parsons issued the present summons. Mr. Fung has argued that Mr. Parsons' action in issuing the summons is precipitate, and explains that the vendor has been rushed into Court, without having an opportunity of rescinding the contract, as he was entitled to do under clause 5 of the "Singapore Conditions of Sale" which were incorporated in the conditions of sale under which the land was sold.

I see no substance in Mr. Fung's objection. Section 4 of the Conveyancing and Law of Property Ordinance entitles either party "at any time or times and from time to time" to apply to the Court in respect of any requisition or objections in connection with the contract. The correspondence shows that the parties were at variance; and had been so, since the letter of the 15th April; and nothing prevented the vendor rescinding the contract under clause 5 (above) between then and now.

With regard to the mortgage of the 28th February 1934 by the administrator; there can be no doubt that, since the mortgagee was aware that the mortgage was for a purpose other than administration, (the purpose of the mortgage was expressed in the deed, viz. to secure the administrator's personal account with the mortgagee) this mortgage is liable to be set aside at the instance of the next of kin or creditors of the intestate, V. R. S. Saminathan Chettiar. (See *Williams* on Executors 12th ed., Vol. 1, p. 571).

It is true that under s. 35 of the Conveyancing and Law of Property Ordinance (Cap. 118) all lands belonging to a deceased person pass to his administrator, "to dispose of and otherwise deal with the same," but such land is of course held by the administrator in trust for the persons beneficially entitled thereto. Under the Trustees Ordinance (Cap. 59) the word "trustee" includes a personal representative; but this will not authorize the administrator to raise money by mortgage for his own purposes. Nor, since the mortgage of the 28th February 1934 did not purport to have been made "under any trust or power vested in trustees," will the mortgagee be protected by s. 19 of the Trustees Ordinance. In that mortgage, it is recited that letters of administration of the estate of V. R. S. Saminathan Chettiar had been granted to the mortgagor, who had an account with the mortgagee, and had agreed to give the mortgagee security for the balance of his account.

From this, it was obvious that the administrator was not acting in the execution of his duty, but has committed a breach of trust; and the mortgagee must be held to have had notice of the true state of facts; and, consequently, only held this property subject to the claims of creditors and beneficiaries. (See *Halsbury*, 2nd ed. Vol. 14, p. 394). The recital in the mortgage, in my opinion, was sufficient to rebut the ordinary presumption that the money was raised for administrative purposes.

It is somewhat significant that in a previous negotiation for the sale of this land, objection was raised to the title on the same ground, and because of this objection (and Mr. Fung says for other reasons), the vendor rescinded a previous contract of sale.

The vendor was clearly aware of the defect in the title. Mr. Fung quite frankly, says he deliberately omitted reference to the mortgage of the 28th February 1934, and made the conveyance of the 8th February 1935 as the instrument from which the title was to commence, as he did not want any more trouble, after the previous objection to the title, to which Mr. Parsons has referred. Mr. Fung does not admit that the title is defective: he says that the matters raised by Mr. Parsons should have been gone into, by requisitions, before coming to Court. He contends that the mortgagor had a right to give the mortgage, and unless it is attacked by the next of kin, it is good. He further says that a mortgagee never covenants for title; and that the sale, under the mortgagee's power of sale, of 8th February 1936 was valid.

The position, as I see it, is this:—The vendor as the result of the objections raised at a previous attempt to sell, was aware that the title was open to question. The mortgagee, from the recital in the mortgage of the 28th February 1934 was also aware that the administrator was not acting in the execution of his duty, and knew or ought to have known that the administrator was committing a breach of trust; with the result that the mortgagee held the property subject to the claims of creditors and beneficiaries.

The case of *In re Verrell's Contract*, (1903) 1 Ch. 65 is somewhat analogous to the present. In that case, 18 years after the death of the testator, the widow-executrix entered into a contract of sale of a leasehold house. In the present case, the intestate died on 4th August 1928; letters of administration were granted to the mortgagor on the 24th June 1929; and more than four and a half years later, the mortgagor gave the mortgage.

In the case of *Verrell*, it was admitted there were no debts owing, and it was not suggested that there was any other reason for selling. Kekewich J., at p. 69 stated "I do not feel myself bound to hold that even an executrix can, in a peculiar case like this, make a sufficient title. I must not say that where there are no debts the possibility of selling for other purposes cannot be regarded as sufficient; it is enough for me to say that I do not think I ought to force a title on a purchaser where there is no definite law on the point." In the present case, the mortgagee knew the purpose for which the mortgage was given, viz. as security for the mortgagor's personal debt to him.

In these circumstances, I consider that the purchaser has shown good grounds why the title, which is obviously defective, should not be forced upon him. This appears to me an issue properly raised in a summons under s. 4 of the Conveyancing and Law of Property Ordinance (Cap. 118) as an "objection," even though the purchaser did not make further requisitions as to the title. The object of that section is to dispose of all questions arising out of a contract of sale, in a summary and economical manner.

I therefore hold that the purchaser's objection is well founded and has not been answered; and that he ought to be discharged from his purchase; and that good title to the land has not been shown, and it is ordered that the defendant do repay to the plaintiff the sum of $300 paid as deposit.

At the request of counsel the question of the costs of this summons is reserved for further argument.

Order Accordingly.

Solicitors for the plaintiff:—*Barrett & Co.*

Solicitor for the defendant:—*S. Fung.*

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., THOMAS. C.J. (F.M.S.) & HOWES, J.

June 26, 1937.

IN RE BROOKE DAVID DECEASED. M. SAYERS AND ANOTHER v. D. B. DAVID AND FOUR OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 77 of 1936]

Infant litigant—Leave to appeal in forma pauperis—Next friend out of jurisdiction—application for extension of time for appeal—Civil Procedure Rules, 0.16 r.27.

An infant's interests under a will were prejudicially affected by a judgment on the construction of such will. The infant by her next friend applied to the High Court for leave to appeal *in forma pauperis* to the Court of Appeal. The papers were sent to counsel for report and the application came before the Judge and was allowed. The applicant subsequently applied to the Court of Appeal for an extension of time for appealing.

Held, that the Court has jurisdiction to allow such an application even though the next friend is out of the jurisdiction. There is no rule in the Colony that upon such an application there must be an affidavit of merits for the consideration of the Court of Appeal and in fact in this case the merits had already been considered by the High Court upon the application for leave to appeal as a pauper.

MOTION to the Court of Appeal for extension of time.

Cobbett for plaintiffs the trustees.

Haydon for D. B. David.

Battishill for M. David, the applicant.

Dr. Withers-Payne for the 3rd, 4th and 5th respondents.

The facts and arguments appear sufficiently from the Judgment.

Cur. Ad. Vult.

TERRELL, AG. C.J.—This is an application by Margaret David, an infant by her next friend Juliana van Waardenburg to extend the time for appealing against the judgment of de Buriatte J. dated the 19th March 1937, notwithstanding that the application is out of time.

In order to get leave the applicant must show merits and must also explain the reasons for delay. As regards the latter, although the Court is strict where the delay has been due to neglect on the part of the solicitors, in this case, the fact that the applicant was in Java, and it was accordingly difficult to obtain instructions, the fact that the time limited for appealing has under the recent amendment to the Rules been reduced to three weeks, and the fact that the applicant is an infant, are matters to be considered, and in my opinion the affidavit in support sufficiently explains the delay that has occurred.

With regard to merits, the application for leave to appeal as a pauper was made by the infant and her next friend by petition dated the 14th April 1937. The Registrar having satisfied himself as to the petitioner's means, the papers were sent to counsel for report, and the matter came before a Judge. The application was heard before Horne J., and he decided to allow the applicant and her next friend to appeal *in forma pauperis*. The question of merits has accordingly been before the Court, and it is not for this Court to retry the issue as to whether there is a *prima facie* case or not. The applicant therefore has complied with the rule which requires her to show merits before she can be granted extension of time.

The present application was opposed by certain of the beneficiaries on various technical grounds and their objections were supported by counsel for the trustees.